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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE CITY OF WATSONVILLE,

Petitioner,

v.

DOLORES CRUZ GOMEZ, PATRICIA LEAL and WALDO RODRIGUEZ,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Plaintiffs-Respondents Dolores Cruz Gomez, Patricia Leal, and Waldo Rodriguez, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's judgment in this case.

STATEMENT OF THE CASE

Plaintiffs-Respondents, Hispanic voters, filed this challenge to the at-large election system as utilized by the City of Watsonville, California, to select members to the City Council, under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. According to the 1980 Census, Hispanics comprised 48.9% of the City's population of 23,543 persons. Appendix at D-3.[1] The Hispanic population

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[1] Appendix citations refer to the Appendix attached to the Defendants-Petitioners' Petition for a Writ of Certiorari to the United States Court of

comprised 37.0% of the City's total citizen population. Appendix at D-5.

The City Council is composed of one mayor and six city council members. Elections to the City Council are on a staggered basis, with three council persons elected at-large in each odd-numbered year. The mayor is elected on an at-large basis, as well. Appendix at D-6.

From 1971 to 1985, eight Hispanic candidates sought election as council members and one Hispanic sought election to the office of mayor. All of these candidates were unsuccessful. Appendix at D-8. For the same time period, in sharp contrast, there were 25 non-Spanish surname winners out of 51 non-Spanish surname candidates. Appendix at D-9.

Appeals for the Ninth Circuit.

After a trial on the merits, the District Court held that the at-large election system as implemented by the City of Watsonville did not violate Section 2. The District Court rejected Respondents' challenge despite several critical factual findings regarding elections in Watsonville. It specifically found that municipal elections in the City of Watsonville were racially polarized.[2] The

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[2] The District Court stated:

> "I find that this evidence strongly suggests to the point of preponderance a proclivity on the part of Hispanic voters and Anglo voters to support candidates who are members of their respective groups. . . . On the issue of polarization, as indicated in Thornburg [v. Gingles, 478 U.S. 30, 106 S.Ct. 2752 (1986)], the court is principally concerned with the behavior of the Anglo community and whether as a factual reality that behavior dictates the virtual impossibility of the election of an Hispanic candidate under the present at-

District Court also found that as to those Hispanics who voted, a significant number of Hispanics have tended to vote for the same Hispanic candidates. Appendix at D-16.[3] Finally, the District Court found that at least two districts could be created which would provide the Hispanic voters "with a fair opportunity to achieve

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> large election procedures. On the basis of the evidence before me, I conclude that a preponderance of the evidence favors plaintiffs on this issue."

Appendix at D-14.

[3] As the District Court found:

> "The true issue, as stated by Justice Brennan, is whether a significant number of minority group members have demonstrated a tendency of practice to vote for the same candidate. The evidence amply supports the affirmative of this issue with respect to those who have actually voted."

Appendix at D-17.

the election of candidates of their choice." Appendix at D-18.

The District Court's decision in favor of the City of Watsonville was based on findings that Watsonville's Hispanic minority lacked political cohesiveness and that the Hispanic community was not sufficiently geographically compact. The District Court concluded that minority political cohesiveness could not be determined on the basis of racially polarized voting patterns alone since the number of Hispanic eligible voters who had voted in prior elections was not significant. Appendix at D-17. The District Court concluded that the Hispanic community was not sufficiently compact because over half of the Hispanic community resided outside the two proposed minority single member districts. Appendix at D-18, D-19.

The Court of Appeals for the Ninth Circuit, applying the standards of Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2762 (1986), reversed the District Court's decision. Since the minority plaintiffs presented a plan consisting of two districts, each with a majority of Hispanic eligible voters, the Court of Appeals held the Thornburg requirement of geographical compactness had been satisfied. With respect to the issue of minority political cohesiveness, the Ninth Circuit Court held that actual voting patterns should be utilized as the standard of proof. Since the District Court found that a significant number of Hispanic voters voted for the same Hispanic candidates, the Ninth Circuit Court concluded that the Thornburg standard of minority political

cohesiveness had been met. Appendix at B-28, B-29.

Having found all of the Thornburg requirements met, the Ninth Circuit concluded that Respondents had established a Section 2 violation and remanded the case to the District Court with instructions to implement a single-member districting plan which comported to Section 2. Appendix B-29.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Petition Presents No Questions as to the Legal Standards for Determining Geographical Compactness or Political Cohesiveness Which Are Sufficiently Important for Supreme Court Review.

The Petition should be denied because it does not present any undecided questions as to either geographical compactness or political cohesiveness of sufficient importance for the Court to

review as required by Rule 17.1(c) of the Supreme Court Rules. In applying Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the United States Court of Appeals for the Ninth Circuit routinely applied the standards of proof for challenges to at-large election systems established by this Court in Thornburg. The Court of Appeals neither enunciated new standards of law nor applied established standards to new factual patterns.

In strict accordance with the findings required by the Thornburg standards, the Ninth Circuit Court held that: (1) the minority community was sufficiently geographically compact to constitute a majority of the eligible voter population in at least two single member districts, (2) the minority community was politically cohesive, and (3) there was an Anglo voting bloc which

voted to defeat the candidates preferred by the minority community. Appendix at B-29. The Ninth Circuit's ruling was based principally upon the following facts: (1) prior to trial, no Hispanic had ever been elected to the office of mayor or city council member despite nine Hispanic candidacies from 1971 to 1985; (2) municipal elections were racially polarized. The evidence on this latter issue, as noted by the District Court, was essentially uncontradicted and completely without criticism. Appendix at B-8, B-9.

The Ninth Circuit's ruling represents a routine application of the Thornburg standards. Thus, the Petition raises no questions of sufficient importance to warrant the granting of certiorari.

This Court's decision in Thornburg identifies minority geographical compactness and minority political

cohesiveness as two of the three critical elements of an at-large challenge under Section 2 of the Voting Rights Act (the other is Anglo bloc voting). See, Thornburg, 106 S.Ct. at 2766-67.

With respect to the geographical compactness requirement, this Court's language is clear. It imposes no requirement, such as that argued for by the Petitioner, that a majority of the City of Watsonville's Hispanic population must reside within the predominantly minority districts. The Petitioner has not cited, and cannot cite, to any language in the Thornburg opinions as support for the gloss it would place over the Court's clear language.

The Ninth Circuit Court correctly applied the Thornburg standard in finding the geographical compactness test met by "a showing that the minority group 'is

sufficiently large and geographically compact to constitute a majority in a single member district.' Gingles, 478 U.S. at 50" (emphasis supplied).

See, Appendix at B-17. The Court of Appeals reviewed the record and found that there were at least two districts which consisted of a majority of Hispanic eligible voters. Appendix at B-18. It correctly deemed the presence of minority group members outside those two minority districts inconsequential.[4]

With respect to the issue of minority political cohesiveness, the Court's

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[4] Accord, Campos v. City of Baytown, Texas, 840 F.2d 1240, 1244 (5th Cir. 1988) ("The fact that there are members of the minority group outside the minority district is immaterial. All that is required is that the minority group be 'sufficiently large and geographically compact to constitute a majority in a single member district.' ").

holding in Thornburg is equally unambiguous:

> A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim . . . and, consequently, establishes minority bloc voting within the context of § 2.

106 S.Ct. at 2769-70.

Consistent with this standard, this Court further stated that one can determine minority political cohesiveness by reviewing actual voting patterns. As stated by the Court, "The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." 106 S.Ct. at 2769.

The Ninth Circuit reviewed the record with respect to actual voting patterns and found that there was "near unanimous support for Hispanic candidates" from the Hispanic community; this pattern "established the requisite political cohesion of the minority group." Appendix at B-22.

In this holding, the Court of Appeals did not create a new standard of proof. Rather, the Ninth Circuit correctly applied the Thornburg standard.[5]

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[5] A similar standard of proof which focuses on actual voting patterns has been applied by other Circuits. Collins v. City of Norfolk, Va., 816 F.2d 932, 935 (4th Cir. 1987) ("[T]he existence of racially polarized voting . . . establishes both cohesiveness of the minority group and the power of white bloc voting to defeat the minority's candidates.") ("The court should inquire separately into minority and majority voting, to see whether members of the minority usually vote for the same candidates -- if so, there is the requisite minority political cohesiveness.").

2. The Court of Appeals' Decision Is Entirely Consistent With Section 2 Decisions of This Court and Other Lower Courts.

Petitioner's assertion that the decision below conflicts with other Section 2 decisions of this Court and other lower federal courts is pure rhetoric without substance.

Petitioner misstates this Court's holding in Thornburg with respect to the Zimmer[6] factors. In Thornburg, this Court applied the totality of circumstances test, first articulated in Zimmer, and later codified in Section 2 as amended, to determine the ultimate question of whether, as the Court below correctly

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The Fifth Circuit followed the same standard in Campos, supra, 840 F.2d at 1244: "[A] minority group is politically cohesive if it votes together."

[6] Zimmer v. McKeithen, 424 U.S. 636 (1976).

framed the issue, "[T]he electoral process is 'not equally open to participation by the members of a [racial or language minority] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Appendix at B-11.

However, both Thornburg and the legislative history of Section 2 as amended explicitly reject Petitioner's notion that certain of the Zimmer factors -- indeed, the less important and non-dispositive ones -- are indispensable to finding that an at-large election system violates Section 2. See, Thornburg, 106 S.Ct. at 2764, 2766 n. 15:

> 'There is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.'

* * *

> The most important Senate Report factors bearing on § 2 challenges to multimember districts are the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized.' . . . If present, the other factors, such as the lingering effects of past discrimination, the use of appeals to racial bias in election campaigns, and the use of electoral devices which enhance the dilutive effects of multimember districts when substantial white bloc voting exists -- for example antibullet voting laws and majority vote requirements -- are supportive of, but not essential to, a minority voter's claim.

(citations to legislative history omitted) (emphasis in original).

Petitioner laments that the Court of Appeals did not require proof of a history of official discrimination by the City of Watsonville, and disputes the Court's conclusion with respect to the evidence of

socio-economic disparities. Petitioner's position boils down to its disagreement with what this Court decided in Thornburg, as Justice O'Connor explicitly recognized in her concurring opinion:

> As shaped by the Court today, then, the basic contours of a vote dilution claim require no reference to most of the "Zimmer factors". . . . There is simply no need for plaintiffs to establish "the history of voting-related discrimination in the State or political subdivision," . . . or "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group," . . . or "the exclusion of members of the minority group from candidate slating processes," . . . or "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health," . . . or "the use of overt or subtle racial appeals in political campaigns," . . . or that "elected officials are unresponsive to the particularized needs of the members of the minority group."

106 S.Ct. at 2788-89; see also, 106 S.Ct. at 2787 ("If these three requirements are met . . . [t]he minority group has proved dilution in violation of § 2").

The Ninth Circuit Court correctly applied the "totality of the circumstances" test as defined by Thornburg. In evaluating the at-large election system utilized by the City of Watsonville, the Ninth Circuit Court focused on the two factors specified by Thornburg. The Ninth Circuit Court found that racial bloc voting existed in Watsonville (Senate Factor 2) and that no minorities had ever been elected to the City Council prior to trial (Senate Factor 7). Appendix at B-24. The Ninth Circuit also reviewed the other Senate Factors. However, consistent with Thornburg, the Court below did not view the remaining

Senate Factors as essential. Appendix at B-28.[7]

Petitioner's contention that there is a conflict between the Ninth Circuit's Watsonville decision and the holdings of other lower courts is likewise in error.

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[7] Accord, Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547, 1561 (11th Cir. 1987) ("Applying the totality of circumstances approach, the district court made specific findings of fact as to other Senate factors bearing on vote dilution. Although these factors are supportive of, but not essential to a minority voter claim, contrary to the district court's findings, proof of these factors is not required to show a vote dilution claim"); id., 1562 ("However, we point out, that Thornburg commands the trial court's attention to the Senate factors which are deemed most important to a vote election claim . . . [:] the extent of minority electoral success and polarized voting); Collins, supra, 816 F.2d at 935 ("The implication of this gloss on (2, is that, of the seven primary factors on the Senate Report list, two are typically the most important: the existence of racially polarized voting, which establishes both cohesiveness of the minority group and the power of white bloc voting to defeat the minority's candidates, and the actual results of minority-preferred candidates in winning elections").

There is no conflict between the decision below and the opinion of the Court of Appeals in Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547 (11th Cir. 1987), with respect to the issue of minority political cohesiveness. In remanding Carrollton for reconsideration in light of Thornburg, the Eleventh Circuit Court specifically noted the absence of any finding of the existence of minority political cohesiveness, and further noted, "The proof of racial polarization may, of course, be found sufficient by this Court to make the necessary finding of cohesiveness." 829 F.2d at 1563 and n. 15. Thus, the Eleventh Circuit decision presents no conflict with the decision below on the issue of minority political cohesiveness.

Likewise, there is no conflict between the decision of the Court of

Appeals in this case and the district court decisions in Thornburg and in McNeil v. City of Springfield, 658 F.Supp.1015 (C.D. Ill. 1987) with respect to the geographical compactness issue. The fact that those two cases were brought as class actions comprise, on this issue, a distinction without a difference. Nothing in the geographical compactness criterion as articulated in this Court's Thornburg decision restricts it to being found in class actions, and nothing in Thornburg or any other decision suggests that the standard for finding geographical compactness applies any differently depending on whether formal class action treatment is obtained.

Just as a Section 2 at-large challenge is an assertion of individual rights that may be brought by or on behalf of less than a large majority (or any

particular number) of minority voters, see pp. 10-11, supra and Appendix at B-18 - B-19, so, too, a Section 2 case is not a popularity contest in which plaintiffs must demonstrate the allegiance of, or promise tangible benefits to, 60% or more of the minority community. If Petitioner has any legitimate concern, it is for the remedy stage of this case, which has not been reached due to Petitioner's years of intransigence and delay in the stubborn defense of its discriminatory election system.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

February 24, 1989.

Respectfully submitted,

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